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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARTHUR H. RUSSELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Can the Trial Court admit a Co-Defendant's confession where such Co-Defendant is asked "Do you understand that you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire?" and he responds—"I don't plan on it". [Right to Counsel].

QUESTION 2: Did Petitioner's convictions on conspiracy to harbor a fugitive (Title 18 U.S.C. Section 371) and aiding and abetting the harboring of a fugitive (Title 18 U.S.C. Section 2 and Section 1071) violate the Double-Jeopardy Clause of the Fifth Amendment to the United States Constitution? [Double Jeopardy].

QUESTION 3: Can the Trial Court exclude proof of the Government's bad faith destruction of criminal evidence and thereby deny Petitioner's right to confrontation by cross-examination? [Due process].

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The Sixth (6th) Amendment to the United States Constitution. Assistance of Counsel. Confrontation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner, Arthur H. Russell files this Petition for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit which affirmed the Trial Court's Judgment and denied a Request for Rehearing En Banc.

In support of the Petition, it is respectfully shown to the Court as follows:

OPINIONS BELOW

The opinion of the Court of Appeals was officially reported. A copy of the full original text of that opinion is attached as Appendix A. A copy of the Order of the Court of Appeals denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is attached as Appendix B. A copy of the Opinion and Judgment of the Trial Court is attached as Appendix C. A copy of the Motion for Stay on Recall of the Mandate is attached as Appendix D.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 7, 1984. A Petition for Rehearing, With Suggestion for Rehearing En Banc, was denied on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involved 18 U.S.C. 2, 18 U.S.C. 371 and 18 U.S.C. 1071. The Petitioner was convicted of conspiracy to harbor the fugitive Gordon Wendell Kahl, and aiding and abetting the harboring of the same fugitive.

SUMMARY OF THE CASE

United States Marshals in the Federal District of North Dakota received an arrest warrant which required them to track down a Federal Parolee and take him into custody. Their efforts to execute this warrant resulted in armed confrontation and a fatal shootout. The alleged fugitive, Gordon Wendell Kahl, next surfaced in the State of Arkansas in early March of 1983, when Kahl was purportedly delivered to Petitioner's residence. According to a Government informant, Kahl remained in

"hiding" there until Memorial Day, May 30, 1983 when he allegedly moved to the Ginters' residence.

After Kahl disappeared from Petitioner's home, Russell's daughter decided to turn informant. She placed a call to the Little Rock office of the FBI and was subsequently contacted by a Special Agent, Jack Knox.

Purportedly acting upon the information provided him by the informant, Knox and his companions obtained a "search warrant" from a Municipal Judge so that they could plan and stage a raid on the Ginter residence. The Municipal Magistrate issued the "search warrant" based on hearsay statements, attributed to the informant, which purportedly described the Ginter vehicle and linked the fugitive, Gordon Wendell Kahl, as a passenger.

Between May 30, 1983 and the morning of June 3, 1983, the FBI planned a "joint operation" with State and Municipal Police. (R.T., Vol. II, Pages 801 and 904). In an effort to bolster the allegations contained in the "Affidavit for Search Warrant", previously referred to, the FBI conducted an aerial reconnaissance of the Ginter residence and surrounding area.

At approximately 5:55 P.M., on the evening of June 3, 1983, this task force descended on the Ginter home with the "planned objective" of apprehending the fugitive. At the same time, Leonard Ginter left his residence and proceeded up his driveway in the family automobile armed with a fishing pole and line, intent on an evening of relaxation. The officers forcibly blocked Ginter's exit, and directed him out of his vehicle. After unfruitful discussion, FBI head, James Blasingame insisted that Ginter summon his wife from the dwelling. Simultaneously with her exit from the house, a chain of events began which resulted, ultimately, in mayhem, arson, and murder.

This much is known. The Ginter residence was gutted by fire, and all of their worldly belongings destroyed. Sheriff Ger Matthews, who entered the house without permission of Blasingame, suffered two gunshot wounds from a large bore shotgun and automatic rifle. Matthews died sometime between his entry inside the house and his subsequent arrival at a local hospital.

FBI Chief, James Blasingame, depicted the experience as "pandemonium". Indeed this was an apt description. In an "altered state" of panic and paranoia the agents unleashed a deadly barrage of automatic weapons fire, and shotgun blasts, on the empty house and its now silent companion.

Mistaking their own ballistic excess as continued resistance from the prone corpse Municipal Police, under the specific orders of the FBI, set the residence ablaze conveniently "torching" all forensic evidence which could disprove armed resistance by the fugitive or establish his identity. (RT., Vol. II, Pages 504 and 524).

When the inferno finally subsided the badly-charred remains of the body were dragged from the gutted interior. Later forensic examination proved that the "victim" was shot from the rear, in the side of the head, at an approximate 45-degree angle, by a bullet from a high caliber pistol not unlike the handgun of the deceased Sheriff. The Federal and State authorities, each now blaming the other for the blaze, both ignored rudimentary procedures for preservation of evidence and failed to even conduct a traditional "grid-search" of the premises.

The executive cover-up, so carefully fabricated at trial of the case below, slowly began to unravel. Although the true story is now known to counsel for Petitioners, and even the Justices of the Court of Appeals below,

the convicting jury remains ignorant of one of the most bizarre episodes of Governmental misconduct ever to stain the bench and bar of a Federal Court.

What is at stake here, very simply, is a Defendant's right to be convicted "on all of the evidence". While the Government complains frequently that it does not have the resources to "produce all of the evidence," that venerable addage must now be modified by the realization that it may yet retain the necessary capacity to destroy it.

Absent from any of the case authority relied on by the Panel of the Court of Appeals, the District Court, or even the Prosecution, is any mandate or rationale which allows the Government to "create doubt," by destroying the better evidence, so that it may rely on the "inferior".

That the Government was rewarded for the above behavior, rather than punished, is but one of the peculiar anomalies of this case which bear scrutiny by this Court.

STATEMENT OF THE CASE

QUESTION 1

Can the Trial Court admit a Co-Defendant's confession where such Co-Defendant is asked "Do you understand that you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire?" and he responds —"I don't plan on it". [Right to Counsel].

In the wee hours of the morning, on June 4, 1983, FBI Officer Dan Oldham and State Sergeant McCoy, came by to have a "little talk" with Co-Defendant Leon-

ard Ginter. Ginter was invited out of his cell and, after interrogation, purportedly signed a written confession which identified the charred remains as those of the fugitive Gordon Kahl, and admitted his own complicity in Kahl's furtive effort to avoid arrest.

This written confession implicated Arthur Russell in a scheme to prevent Kahl's detection. The wording of the "statement" was so inculpatory that the prior oral confessions pale by comparison.

The Prosecution prevailed below on the argument that the confession was voluntary. Yet, prior to the taking of the statement, Ginter was asked the following questions and gave the following answers:

> Q: Do you understand that you have the right to remain silent?
> A: Yeah.
> Q: Do you understand that anything you say can and will be used against you in Court?
> A: Yeah.
> Q: Do you understand that you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire?
> A: *I don't plan on it.*"

(See Transcript of Suppression Hearing 94 and 95). (Defendant's Exhibit 3 to Suppression Hearing).

Before the introduction of this "voluntary confession," all the Prosecution had going for it was the credibility of the reviewing officers' oral testimony. Obviously, the probative force of the written confession far outweighed the officers' version. Here was an admission of guilt, in writing, under the Defendant's own signature.

The Memorandum Opinion of the District Court, and the Opinion of the Court of Appeals, affirming Petitioner's conviction, are curiously silent in reference to the above language. One scans their pages in vain for any rationale squaring Petitioner's clear refusal to waive counsel (I don't plan on it.) with the dictates of this Court in *Edwards v. Arizona,* 451 U.S. 447 (1981).

If *Edwards* stands for anything, it requires that interrogation stop when a Defendant invokes his right to counsel. Conversely, refusal to waive counsel is equivalent to invocation. Both the District Judge, and the Panel of the Court of Appeals apparently chose to ignore that which they could not square with the dictates of the *Edwards* opinion. Yet, this "written waiver" form is of crucial importance in applying the rules of law bearing on the voluntariness of confessions. Even at 1:20 A.M. in the morning, Leonard Ginter refused to waive assistance of an attorney. After this clear refusal to waive counsel, interrogation should have ceased. Instead, these "law officers" continued to interrogate him and obtained the inculpatory evidence. In so doing, the police violated the rule of law concerning re-initiation of interrogation spelled out in *Edwards.*

The jury was allowed to assume the statement voluntary. Ginter, in its text, positively identifies the charred body in the gutted residence as Gordon Wendell Kahl. That the jurors could disregard this identification evidence when weighing the guilt of Petitioner Russell, is such a ludicrous prospect that it cannot be seriously entertained. The credibility of the written confession, prepared by the special agents, which Leonard Ginter refused to sign, prepared *after* execution of the waiver

form, incredibly enhanced the Government's case against all of the Defendants. Its admission was not harmless mistake, but grievous error, warranting a new trial.

QUESTION 2

Did Petitioner's convictions on conspiracy to harbor a fugitive (Title 18 U.S.C. Section 371) and aiding and abetting the harboring of a fugitive (Title 18 U.S.C. Section 2 and Section 1071) violate the Double-Jeopardy Clause of the Fifth Amendment to the United States Constitution? [Double Jeopardy].

As stated in *United States v. Austin*, 529 F.2d 559 (C.A. 6, 1976):

> ". . . It is clear that the Fifth Amendment comes into play to prohibit double punishments when a substantive and conspiracy Count of an Indictment charge essentially the same offense . . .".
>
> "As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.". See *Austin* at Page 562. Citing also *Gavieres v. United States*, 200 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

Here, as in *Austin*, an examination of the record reveals:

> ". . . That essentially the same evidence in this case was relied upon to prove both the Conspiracy Count and the substantive offense(s). The proof was offered indiscriminately on all three (3) Counts and it would be difficult, if not impossible, to weed out any item of evidence that was not pertinent to all Counts.". See *Austin*, at Page 563.

All of the alleged acts of Russell which, by any stretch of speculation, could be in furtherance or support of the conspiracy, are directly relevant in proving the substantive offense of aiding and abetting the harboring of the fugitive. There was no independent proof of conspiracy which did not bear upon, and establish, the aiding and abetting of the substantive offense. Therefore, the double-jeopardy clause comes into play and the District Court was prohibited from imposing double punishment upon Russell, for the same alleged act or acts, in violation of the Fifth and Eighth Amendments to the United States Constitution. (Imposition of double punishment would also be "cruel and unusual" within the ambit of the Eighth Amendment).

The *Austin* Rule has been adopted by several Circuit Courts of Appeal and the decision itself has never been reversed. See *United States v. DeVincent,* 632 F.2d 155 (C.A. 1, 1980) and *United States v. Sperling,* 560 F.2d 1050 (C.A. 2, 1977). As stated by the Second Circuit in *Sperling,*

> ". . . Whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.". See *Sperling,* at Page 1055.

The Double-jeopardy clause ". . . prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.". See *Sperling* at Page 1054. The dissent in *Sperling* draws attention to several principles which have application in this case. Firstly, not all concerted action is the equivalent of conspiratorial action. For ". . . a conspiracy requires a preconcert and

connivance.". *Sperling* at Page 1060. Citing *United States v. Peterson,* 524 F.2d 167 (C.A. 4, 1975). Furthermore, concerted action may result from duress, rather than agreement. *Sperling* at Page 1060. Citing *United States v. Tierney,* 424 F.2d 643 (C.A. 9). "It may be simply the joint activity associated with aiding and abetting.". Citing *United States v. Hodorowicz,* 105 F.2d 218 (C.A. 7) and *Jamail v. United States,* 55 F.2d 216 (C.A. 5, 1932). The sole evidence which could possibly link Russell to a conspiracy, in this case, fails to establish "preconcert and connivance". At most, the Government proved the type of "joint activity associated with aiding and abetting". As in *DeVincent,* the Prosecution has attempted to prove the two Counts of the Indictment with the same evidence.

The above effort is precluded by specific authority from the Circuit below.

> ". . . *Generally, a conspiracy requires different proof of facts* than does a substantive offense, and in that manner they do not arise out of precisely the same acts or transactions. *Where both the conspiracy and the substantive offense do consist of the same acts or transactions a conspiracy charge may not be added to the substantive charge.*". See *United States v. Skillman,* 442 F.2d 542 (C.A. 8, 1971) at Page 549. Citing *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, L.Ed. 1485 (1946).

It is clear from a review of the evidence that all the acts allegedly committed by Russell in furtherance of the substantive offense, which included the charge of aiding and abetting, are the "same acts or transactions" which the Government advanced to support his guilt on the

conspiracy Count. Accordingly, Judgment of Acquittal should have been entered as to Count 1 of the Indictment. It is anticipated that the Government will urge invocation of the so-called "concurrent sentence" doctrine to avoid the application of the double-jeopardy clause. The "concurrent sentence" doctrine has been the subject of much controversy and has been discredited in most of the Circuits. A reversal of the conspiracy Count in this case will have the salutary effect of discouraging the Government's efforts to drag prospective Defendants through trials where the number of Counts in the Indictment are artificially inflated on the same evidence. Allowing the Government largesse to subject a Defendant to a multiplicity of Counts, based on the same transactions and acts, is constitutional deprivation. The distinction of punishment imposed is not the only consideration here. All federal Courts should be mindful of the substantial punishment inflicted on a Defendant through trial of the case on an Indictment containing superfluous counts. Additionally, the crimes charged are serious enough that conviction of either carries a stigma which, standing alone, should preclude the doctrine's application.

QUESTION 3

Can the Trial Court exclude proof of the Government's bad faith destruction of criminal evidence and thereby deny Petitioner's right to confrontation by cross-examination? [Due process].

If a sovereign would impose criminal penalties on its subjects, for violations of its criminal laws, it must observe a corresponding duty to preserve all evidence coming into its hands directly bearing on the guilt or innocence of the accused. This was so at common law

and is most aptly demonstrated by the Latin maxim pertaining to destruction of evidence—Omnia Praesumuntur Contra Spoliatorem.

An ancient line of cases engrafts this rule upon American jurisprudence. The Supreme Court of the United States, almost 90 years ago, commented upon the rule and, finding it still viable, observed:

> "The rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates the presumption that the testimony, if produced, would be unfavorable.". *Graves v. United States,* 14 S.Ct. 40 (1893) at Page 41.

The above rationale has been held applicable to destruction of material evidence in both civil *and* criminal cases. See *United States v. Johnson,* 288 F.2d 40 (C.A. 5, 1961) at Page 45; *Ford v. United States,* 210 F.2d 313 (C.A. 5, 1954) at Page 317; *Wenniger v. United States,* 352 F.2d 523 (C.A. 3, 1965); and *Margoles v. United States,* 402 F.2d 450 (C.A. 7, 1968) at Page 451.

In *Margoles* the Seventh Circuit faced outright destruction of evidence. There the telephone company, which had previously been under Government subpoena, destroyed crucial wiretap evidence. The Court of Appeals in *Margoles* refused sanctions because:

> "We see no basis for the claim of Petitioner on appeal that the Government is chargeable with Wisconsin Bell Telephone Company's 'erasure' of the record of surveillance lines, and that Petitioner is therefore entitled to a presumption that this information, if available, would aid him. There is no

> evidence whatever upon which Petitioner can establish his claim that the Telephone Company's intentional 'concealment' constitutes a conspiracy . . .". See *Margoles* at Page 452.

Several other recent cases have addressed these same issues. See *United States v. Williams,* 481 F.2d 735 (C.A. 8, 1973) and *United States v. Anders,* 602 F.2d 823 (C.A. 9, 1979).

The Government's identification relied principally on the testimony of Dr. Fahmy Malak who, in turn, relied on a cranial x-ray of the alleged fugitive, Gordon Wendell Kahl. Malak allegedly compared the teeth of the corpse with the teeth displayed in the x-ray. To accomplish this, he composed a chart of the teeth, as they were found in or around the skull of the corpse, on the one hand, and the teeth, as displayed in the x-ray, on the other. (R.T., Vol. II, Page 630, 631, 632, and 633).

Save for a few other superficial and inconclusive indicia of identification:

> (1) Shrapnel present in the left hip area (R.T. Vol. II, Page 64) and
>
> (2) prescription lenses present in the eyeglasses found near the body (R.T., Vol. II, Page 635).

No other mode of identification of the body was available to the examiner.

The identity of the corpse in the Ginter residence was a crucial issue at trial. The jury had to resolve this question without the benefit of the fingerprints which were conceded, by all parties, to be the superior proof of identification. (R.T., Vol. II, Page 652).

Prior even to the impanelling of the Grand Jury in the case below, the Government had already taken crucial evidence of identification from the jury. Any Justice of this Court who has faced the trial frustration of striving to attack the credibility of Government witnesses while choking on a gag of judicial prejudice would well appreciate the legal novelty of the following passage:

> "The District Court also noted that the destruction of the fingerprints by the fire potentially served to aid the Defendants, because it made it more difficult for the Government to establish the identification of the corpse.". (See Appendix A, Page 20).

A Court that can seriously repeat the above epistle is one that would "pre-package" the trial evidence "to fit the crime".

In *Margoles*, the case previously cited, the appealing parties were denied relief, because they had failed to take ". . . sufficient steps . . ." to produce the missing witnesses complained of. The Seventh Circuit found no evidence that the witnesses were under the "sole control" of the Government. Thus, they were not available to the Defendants in their case-in-chief. At the outset, it must be recognized that the facts of *Margoles* are not present here. Throughout the trial, Defendants announced their intention of proving substantial Government misconduct and destruction of evidence. Throughout the trial the District Court allowed the Government to present its chronicle of the alleged "shooting of Sheriff Matthews" but refused to allow the Defendants the necessary evidentiary leeway to rebut the purported "positive identification" of the body by Malak and the Arkansas medical examiner's office. The continual and repeated references to the "killing" of Matthews unsolicited by

the Defendants, began with the opening argument of Asa Hutchinson (R.T., Vol. I, Page 150, 152, and 153) and continued throughout the testimony of various Government witnesses. (R.T., Vol. I, Page 177, 180, 205, 721, 722, 723, and Vol. II, Page 799). These repeated references to Matthews' death were highly prejudicial to all of the Defendants, especially so in light of the unconstitutional limitation on the Defendants' right to cross-examine Government witnesses concerning Government destruction of evidence, and other misconduct, at the scene of the crime, and the Court's blatant denial of due process attendant to its refusal to allow Defendants to present their own direct evidence, through experts, on these issues to the jury. (R.T., Vol. III, Page 1124, 1125, 1128, and 1129.)

The offer of proof would have established:

1. That the Federal Bureau of Investigation had control over the premises from approximately 6:15 p.m., when the last shot from inside the house was alleged to have been heard, to and until June 4 or 5, 1983, when the premises was finally relinquished. (R.T., Vol. II, Page 810).

2. The fire inside the house was intentionally set by state and federal officers utilizing kerosene accelerant.

3. Expert testimony would have established that accelerant was scattered in the house in such a manner as to result in at least two points of origin for the blaze.

4. No effort whatsoever was made by the authorities to preserve the crucially important identification evidence, such as the fingerprints, which would have been present prior to the intentional and malicious destruction of the home.

The instant case reeks with unprecedented and outrageous Government misconduct which had the effect of destroying material evidence directly pertinent to, a crucial element of the Government's case—i.e. the identification of the corpse as the "fugitive" sought under the warrant.

Both the District Court and the Court of Appeals continually referred to the Government misconduct as irrelevant. Yet, the District Court, on at least one occasion, contradicted itself. (R.T., Vol. II, Page 826, 829 and 832). The basis for relevancy of the excluded evidence and testimony, and the "justification defense", a defense wrongfully denied Defendants by the District Court's prejudicial rulings, was explained, in minute detail, through the arguments of counsel. (R.T., Vol. I, Page 39, 40, 41, and 42 and Vol. III, Page 1181 and 1182).

If this was Gordon Kahl, he never surrendered. He never had the chance. (R.T., Vol. II, Page 530 and 862). He was shot in the back of the head, at close range, with a high-powered revolver. After all shooting from the inside had stopped, the officers at the scene willfully set the residence on fire, and no search of the premises was even initiated until the following morning at 7:30 a.m. (R.T., Vol. II, Page 504).

Not only did the fire destroy identification evidence, such as fingerprints of the corpse, but it also destroyed the "ballistics of the various weapons allegedly found inside the residence, including the purported mini 14 "murder weapon". (R.T., Vol. II, Page 524).

Since both Dero Downing and James Blasingame repeatedly denied "any knowledge" of the use of accelerant at the premises, any proof refuting their testimony was proper, not only to show Government misconduct and

destruction of crucial identification evidence, but, also, to impeach the veracity of the federal witnesses themselves.

There is no inalienable right of the sovereign, at least in these United States, to conceal evidence of its own misconduct, directly bearing on suppression of material evidence at a criminal trial, for the mere sake of expediency in obtaining a conviction. The limitations on this form of "sovereign abuse" were most eloquently described in *United States v. Bryant,* 439 F.2d 642 (C.A.D.C., 1971) a renowned opinion which has been followed, uniformly, in all the Circuits, without deviation. In *Bryant* the Court of Appeals was faced with intentional destruction of material evidence, by an agent of the Bureau of Narcotics, possibly material to the case of the complaining Defendant. The Court of Appeals, in its scholarly opinion noted:

> "Beside the carefully safeguarded fairness of the Court is a dark no-man's land of unreviewed bureaucratic and discretionary decision making. Too often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages. That, we are told, is what happened here.
>
> "The right at stake in the cases before us is Defendant's discovery of evidence gathered by the Government, evidence whose disclosure to defense counsel would make the trial more a 'quest for truth' than a 'sporting event'. This safeguard of a fair trial is surely an important one. But here it was undercut at the pre-trial period by bureaucratic procedures and/or discretionary decisions of Government investigative agents who made no effort to preserve discoverable material. When defense motions for discovery were made, it turned out that material was unaccountably 'lost'. The issue presented is

> whether intentional non-preservation by investigators —as opposed to bad faith destruction or prosecutorial withholding of—discoverable evidence amounts to its illegal suppression. Although we remand these cases for a further hearing on the investigator's conduct, we require rigorous procedures to govern preservation of such evidence by federal investigative agencies, including the District of Columbia, of Police in the future.". Emphasis supplied, see *Bryant* at Page 644.

Bryant was handed down over ten years ago. The "rigorous procedures" were apparently implemented prior to Petitioner's case, but never followed. In fact, they were intentionally and, perhaps maliciously, ignored. (R.T., Vol. II, Page 519).

Bryant was a "surveillance" case wherein the Government's sole evidence against some Defendants consisted of an agent's testimony concerning his recollection of conversations on the destroyed tapes. Highlighting the serious and grievous denial of due process attendant to the destruction of such key evidence, the Court of Appeals reasoned:

> "Without Agent Pope's account of the motel room conversations, the Government would have almost no evidence against Appellant Bryant and a much weaker case against Appellant Turner. Its theory was that the Appellants aided and abetted in the sale of heroin by Johnson, and the testimony as to the motel conversations was necessary to clarify their roles as active participants. Citing *Bailey v. United States*, 416 F.2d 1110 (1969). Besides Agent Pope, the Government presented only two other witnesses; a surveillance agent who had observed the comings and goings outside the motel,

but knew nothing of where Appellants went or what they did once inside, and the chemist who identified the heroin that had been transferred. Appellants did not testify. Thus, it was that the credibility of Agent Pope's story became the key to conviction.". See *Bryant* at Page 645.

The "key to conviction" in the instant case was, undoubtedly, the identification testimony which matched the corpse with the wanted fugitive. Any evidence tending to discredit the Government's version was not only material, but crucial, to Appellant's case. A wanton effort by the Government to destroy and/or conceal such evidence might have, if believed by the jury, vitiated the credibility of the whole Government case. As stated by the Court of Appeals in *Bryant*:

"There can be little, if any doubt, that the tape would have been more reliable than Agent Pope's recollection as evidence of what Appellant's roles in the heroin sale actually were. Agent Pope testified he took no notes on the conversations until after they were over, and even then he made only very sketchy notes on his hand and on scraps of paper. He did not prepare a full report until he had returned to Detroit as much as 1 to 4 days later . . .

"Although the agent's report was turned over to Appellants at trial, it could hardly sustitute for the tape and eliminate the possibility of serious prejudice. It is possible, after all, that the tapes might have revealed that there was no discussion whatever of a narcotics deal while Appellants were in the room, or that they in no way participated in the conversations. More probably, the tape might have clarified the context in which certain remarks were made or corrected other matters of emphasis and degree in Agent Pope's testimony.". See *Bryant* at P. 645.

The effect of the Court of Appeals' analysis in *Bryant*, is clear. Neither a Court of Appeals nor a District Court should speculate on the effect that material evidence will have on the jury as a basis for excusing the Government's negligent or willful destruction. Certainly, the Government, through testimony of its own experts, has highlighted the crucial importance of the identification evidence already destroyed prior to the indictments in this cause. It would strain the credulity of any fair-minded jurist to suggest that the destroyed evidence could have had no effect on the outcome of the trial. In light of the testimony of the deceased's own daughter, concerning the accuracy of Malak's "dental identification," the Defendants were denied evidence which, construed in a light most favorable to them, might have required directed Verdict of Acquittal. (R.T. Vol. III, Page 1198, 1201 and 1206).

Here, as in *Bryant*, the Supreme Court is faced with a case of intentional destruction of evidence in a manner violating the admitted bounds of good police practice both, by the FBI and State Police. (R.T. Vol. II, Page 810 and 874). As the Court of Appeals was required to observe in *Bryant*:

> "It is important to recognize that this is not a case of a good faith effort to preserve highly relevant evidence, frustrated only by inadvertent loss, rather it is a case of intentional non-preservation by an investigative official. On a spectrum between good faith but inadvertent loss and bad faith destruction, Agent Warden's conduct must lie somewhere in the middle. Perhaps it should lie somewhat closer to the later end. For, despite the overriding vagueness of Agent Warden's testimony, there is, at the very least, a hint of bad faith in the record. A highly disturbing

> element of the agent's conduct is his apparent reluctance to let even the United States Attorney's Office know that a tape recording had ever been made . . .". See *Bryant* at P. 647.

The present case exceeds the bad faith considerations in *Bryant* or, at the very least, rates at the "top" of the scale. A "highly disturbing element" in this case is the failure of the FBI to provide a copy of its "internal investigation report" on the incident to the United States Attorney in charge of this case. (R.T., Vol. II, Page 813). This failure, in light of the other efforts to "cover-up" destruction of essential evidence, not only constitutes a denial of due process, but, also, is an affront to the dignity of the Federal Courts. As stated by the Court of Appeals in *Bryant,* the excluded evidence not only creates "substantial room for doubt, but room for nothing except doubt . . ." as to the effect of disclosure. See *Bryant* at Page 648. *Bryant* also supports Mr. Karr's argument for a *Brady* review of the internal report. (*Brady v. Maryland*, 82 S.Ct. 1194) by the District Court. It appears, in this case, that the worse fears of the Court of Appeals in *Bryant* have finally been realized. The Government has avoided disclosure ". . . by destroying vital evidence before prosecution begins . . . and before Defendants heard of its existence . . .". See *Bryant* at P. 651.

The "earnest efforts" to preserve crucial evidence, envisioned by *Bryant* are simply not present. Even:

> ". . . negligent failure to comply with the required procedures will provide no excuse . . .". See *Bryant* at P. 652.

Where evidence bearing on guilt or innocence has been completely destroyed, a new trial would be pointless and

a Federal Court should reverse a conviction and direct an acquittal. That choice, of course, is within the discretion of this Court. However, the *Bryant* decision was not rendered in a vacuum, nor has it lost its viability. The most recent case highlighting the *Bryant* rule, *United States v. Kincaid,* 712 F.2d 1 (C.A. 1, 1983) involved intentional destruction of monitoring tapes by the United States Coast Guard which might have been material in revealing permission by a foreign government to search a vessel on the high seas. The First Circuit Court of Appeals required a showing of prejudice on the part of the Defendants which they did not meet. The Court of Appeals cited numerous cases supporting the proposition that where evidence is destroyed, one may infer its contents were unfavorable to the possessor. See *Kincaid* at P. 3. Citing *Vick v. Texas Employment Comm.,* 514 F.2d 734 (C.A. 5, 1975) and *Wigmore on Evidence,* Section 290-91.

The Government avoided imposition of sanctions in *Kincaid* because, ultimately, the tapes were held immaterial to any issue of guilt in the trial. However, taking into account the strong language of the Panel Opinion, condemning the Government's conduct, that Court of Appeals would definitely have reversed and remanded the instant case.

Recent cases have demonstrated that the sanction of dismissal or new trial will be imposed on a proper showing of prejudice. See *United States v. Gantt,* 617 F.2d 831 (C.A. D.C., 1980); *United States v. Nabors,* 707 F.2d 1294 (C.A. 11, 1983); *Banks v. F.A.A.,* 687 F.2d 92 (C.A. 5, 1982); and *United States v. Doty,* 714 F.2d 761 (C.A. 8, 1983).

In *Banks* the Court of Appeals set aside discipline imposed on air traffic controllers based on an administrative finding of ingestion of drugs. Holding the destruction of evidence intentional, the Court of Appeals condemned the conduct of the administrative agency recalling that in a previous case, the Court had warned:

> "The crucial issue then, is whether the lack of the experimentally produced methoquolone requires reversal because it would have been 'likely to have changed the verdict'. Citing *Armstrong v. Collier,* 536 F.2d 72 (C.A. 5, 1976). . . .
>
> An important factor . . . is whether the evidence was 'crucial to a determination of the guilt or innocence of the accused', *United States v. Hildebrand,* 506 F.2d 406 (C.A. 5, 1975)."

The Court of Appeals in *Banks* dismissed, as deficient, the Government argument that the Defendants could cross-examine *their own* experts who had, in turn, examined the vials of drugs before they were destroyed, observing:

> "The opportunity to cross-examine the laboratory director falls far short of substituting for the samples themselves. *He obviously would be a highly antagonistic witness in any challenge of the laboratory results.*". See *Banks* at P. 94.

Here, as in *Banks,* the destroyed evidence ". . . could determine the ultimate issue. . .". See *Banks* at P. 96. Since it can not be seriously argued that the absent evidence would have been significant to the fact finder, the absence of such evidence was clearly prejudicial to the Defendants. See *Nabors,* at P. 1297. The non-avail-

ability of the evidence, due to the Government's bad faith misconduct, mandates reversal and acquittal or reversal and remand. See *Barnard v. Henderson,* 514 F.2d 744 (C.A. 5, 1975). Obstructive behavior on the part of the Government has been catalogued and condemned before, apparently with little results. See *United States v. Banks,* 374 F.Supp. 321 (D.C.S.D., 1974) at P. 325. The very "circumstances of the act manifests bad faith". See *Vick* at P. 737.

Recent guidelines from the Eighth Circuit require sanctions and judicial intervention where:

1. The Government is responsible and thus culpable for the loss.
2. The evidence destroyed was stronger and more reliable than that introduced by the Government, on the same point.
3. The evidence was critically relevant on an issue in the case — i.e. identification.

See *Doty* at P. 764. Citing *United States v. Grammatikos,* 633 F.2d 1013; *United States v. Baca,* 687 F.2d 1356 and *United States v. Picariello,* 568 F.2d 222. There was no "independent evidence of guilt" overcoming the inferences raised by the destruction of evidence. See *Gantt* at P. 842. In the present case, the District Court's rulings prevented the Defendants (including Petitioner) from introducing sufficient evidence before the jury to support the submission of a jury instruction equivalent to that of the "absent witness" described in *U.S. v. Anders,* 602 F.2d 823 (C.A. 9, 1979).

As stated in *Anders,* —

> "If you believe that the Government had the ability to produce stronger and more satisfactory evidence than that which was offered on any material point, you should distrust any weaker and less satisfactory evidence offered by it.". See *Anders* at Page 825, Note 4.

The District Court's rulings of irrelevancy prevented the various Defendants from submitting this instruction, as the Court's mandate insured that there was no evidence to support it. This result was clearly and fundamentally wrong. Thus, Petitioner was deprived of a critically-important evidentiary presumption which should have operated in his favor. There was no way to cure the evidentiary deficiency, wrought by the destruction, through cross-examination. See *Gantt* at P. 843.

Citation to *Doty* in the Eighth Circuit Opinion is notably lacking. In that case an Eighth Circuit Panel affirmed a conviction, against claims of destruction of evidence, largely on the following basis:

> "Where responsibility for the loss or destruction of evidence lies primarily with *State authorities,* Courts have been reluctant to impose sanctions for its non-production by the Federal Government. Moreover, although the plants were not destroyed pursuant to Court Order, in the circumstances of this case we are not convinced the officers acted in bad faith in burning the marijuana at the scene. . .".
>
> Further, defense counsel could have attempted to discount the proferred testimony through inquiry into the officers' training and experience as well as the circumstances surrounding the plants' destruction.". Citing *U.S. v. Henry,* 487 F.2d 912 (C.A. 9, 1973). See *Doty* at Page 765.

It seems that the Eighth Circuit would deny Arthur Russell the same privilege it extended to *Doty* and his errant counsel—That of questioning the credibility of the "destroying officers" and exposing the jury to the "circumstances" surrounding the destruction.

Certainly this cannot be a fair result. But, more important for the purposes of this Petition, it is not a consistent one. Under *Doty's* rationale the Court of Appeals was *bound* to assess the Government's culpability for the destruction and to make a realistic appraisal of the significance of the evidence.

Tom Lee's offer of proof, through Mr. Charles Karr, dispelled any hope of FBI escape through the "trap door" of *state* culpability described in *Doty*. See *Doty* at Page 764. Lee freely admitted that he torched the house under direct orders of the FBI.

The basis upon which the District Court, and the Panel of the Court of Appeals concluded "impartially" that the identity of the corpse was established, as a matter of law, prior to trial, remains a mystery to this counsel. The above language, however, converts a disputed issue at trial into a "directed verdict" on the identity issue.

Likewise, no serious reading of the transcript can support the claim that:

> "A review of the trial transcript reveals that the Defendants did not claim that the Government intentionally destroyed Gordon Kahl's fingerprints.". (See Panel Opinion at Page 20).

To the contrary, the "offer of proof" by Charles Karr (counsel for the Ginters) clearly established that "Town

Marshall Tom Lee" intentionally set the blaze to "burn Kahl out".

To claim, in the face of this evidence, that the Government officials had no intention of harming Kahl's person is to reach a result "by hook or by crook" as noted by Mr. Justice Blackmun of the United States Supreme Court.

The Government places its own credibility at peril by negligent or intentional procedures which destroy crucially relevant evidence which should be available for the trier of fact. In the case below, the motive for such destruction was a matter for the jury, not the Court nor the Appellate judiciary. Likewise, the credibility of the Government officials destroying the evidence was placed at issue by their own hands and was appropriate fodder for "the vagueries of a jury's suspicion".

As the Government is fond of stating, jurors, when they enter the jury box, do not abandon common sense. There is no reason for the Supreme Court, or any Federal Court, when faced with such an improbable argument, to do so either. To claim, as the Panel apparently hints, that those setting a fire do not intend, by their act, to destroy, may well become the greatest "non-sequitur" of the criminal law.

The convictions should be reversed or reversed and remanded for a new trial.

REASONS FOR ALLOWANCE OF THE WRIT

The Government reinitiated interrogation of a Co-Defendant Leonard Ginter after he invoked his right to counsel. Therefore, the subsequent written confession was inadmissable and should have been suppressed. Assistance of counsel. Due process.

Petitioner's dual conviction for aiding and abetting the harboring of the fugitive and conspiracy to harbor violate the double-jeopardy clause of the Fifth Amendment to the U.S. Constitution. Double Jeopardy.

The issue of bad faith destruction of the evidence and Government credibility was for the jury. Right to cross-examination. Right to confrontation. Due process.

CONCLUSION

For all of the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
Arthur H. Russell

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that a true and correct copy of the foregoing was sent to Charles K. Karr, 505 First National Bank Building, Fort Smith, Arkansas 72901, Michael Louis Minns, 430 Highway 6 South, Suite 207, Houston, Texas and Asa Hutchinson, U.S. Attorney, P. O. Box 1524, Fort Smith, Arkansas 72902 on this the _____ day of February, 1985.

JOE ALFRED IZEN, JR.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2615

United States of America, Appellee,
v.
Ed Udey, Appellant.

No. 83-2632

United States of America, Appellee,
v.
Arthur H. Russell, Appellant.

No. 83-2654

United States of America, Appellee,
v.
Leonard G. Ginter, Appellant.

No. 83-2655

United States of America, Appellee,
v.
Norma Ginter, Appellant.

Appeals from the United States District Court
for the Western District of Arkansas

Submitted: May 14, 1984
Filed: November 7, 1984

Before LAY, Chief Judge, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

The appellants, Edwin C. Udey, Arthur H. Russell, Leonard Ginter, and Norma Ginter, were indicted for conspiring to harbor and conceal a fugitive, and for the substantive offense of harboring and concealing a fugitive. They were tried by a jury and convicted on each count. The district court[1] sentenced Udey to five years imprisonment on each count with the sentences to run concurrently. Russell was sentenced to five years on each count, but the period of actual incarceration was to be six months followed by four years probation in lieu of the remainder of the term which was suspended. Leonard Ginter received a sentence of five years on each count with the sentences to run concurrently. Norma Ginter was sentenced to five years on each count, but the sentence was suspended and a five year probation term was imposed instead. The defendants appeal their convictions under 28 U.S.C. § 1291 (West Supp. 1984). For the reasons stated herein we affirm the convictions.

I. FACTS

On February 13, 1983, a shootout occurred in Medina, North Dakota, which resulted in the death of two United States Marshals.[2] The following day a magistrate issued a warrant for the arrest of Gordon W. Kahl for the murders of the two marshals. Thereafter, on March 11, 1983, another warrant for Kahl's arrest was issued based upon a federal grand jury's indictment charging Kahl with

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1. The Honorable H. Franklin Waters, Chief Judge, United States District Court, Western District of Missouri.

2. The details of the Medina shootout, and the events leading to the search for Gordon Kahl are discussed at length in *United States v. Faul*, No. 83-1912 (8th Cir. _____, 1984).

murder. A nationwide manhunt for Kahl ensued, leading law enforcement authorities to the Ginters' residence near Smithville, Arkansas, where another shootout occurred in which Gordon Kahl and a local law enforcement officer were killed.

The evidence at trial—elicited largely from Karen Robertson, Arthur Russell's daughter—established that on March 13, 1983, Leonard Ginter was introduced to Karen Robertson at Russell's home in Mountain Home, Arkansas. The same day Gordon Kahl moved into the Russell residence where he continued to reside until May 30, 1983. During this period Kahl discussed the North Dakota incident with Russell and Robertson, and they watched television news accounts of the search for Kahl.

Udey visited the Russell residence during this period, and on his first visit he referred to Kahl as a hero. Thereafter Kahl visited Udey's residence at least twice. Udey initiated at least one of the visits by inviting Kahl to dinner.

In Mid-May 1983, the Ginters visited Russell's residence. Leonard Ginter had an FBI wanted poster of Kahl, which was discussed with Kahl. On May 30, 1983, another discussion with Kahl took place at the Russell residence, where the Ginters, Russell, and Udey were present, regarding the FBI search. Later that day Gordon Kahl moved to the Ginters' residence near Smithville, Arkansas, as the group believed the FBI to be "closing in" on Kahl.

On June 3, 1983, law enforcement authorities went to the Ginter residence in search of Kahl, and a shootout occurred. The Ginters' home was burned down during

the shootout. Afterwards, the remains of a mini-14 rifle similar to one that Kahl had at the Russell residence was recovered. Also recovered in a similar condition, was a shotgun belonging to the United States Marshals' office in North Dakota, which was lost in the February 13, Medina shootout. The body of a man burned beyond recognition was also discovered; it was later identified by the Medical Examiner as Gordon Kahl.

II. ISSUES

The appellants raise several issues on appeal. They are: 1) whether the district court erred in denying Udey's and Russell's motions for acquittal; 2) whether the convictions constitute double jeopardy; 3) whether the district court erred in denying the motions to suppress evidence: 4) whether the district court erred in denying admission of the defendants' expert's testimony; 5) whether the district court erred in not appointing the Ginters the counsel of their choice; 6) whether the district court erred in refusing to admit statements made by the Ginters to the police; and 7) whether Udey's sentence was too harsh.

III. DISCUSSION

A. Motions for Acquittal

Russell and Udey allege that the trial court erred in denying their motions for acquittal. Udey claims the evidence failed to show that he had knowledge of the warrant for Kahl's arrest. Russell claims that the evidence failed to establish an act by him of concealing Kahl.

In *United States v. Jackson,* 680 F.2d 561 (8th Cir. 1982), we stated:

> When reviewing a denial of a motion for acquittal we examine the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences that may logically be drawn from the evidence. We will reverse only if a reasonable jury could not have found beyond a reasonable doubt that the elements of the crime existed.

Id. at 563 (citations omitted). *See United States v. Michaels,* 726 F.2d 1307, 1311 (8th Cir. 1984).

In order to prove the violations of 18 U.S.C. § 1071 charged in Counts II and III of the indictment, the government had to establish that: (1) the defendants knew that a federal warrant had been issued for Kahl's arrest; (2) the defendants harbored or concealed Kahl; and (3) the defendants intended to prevent Kahl's discovery and arrest. *See United States v. Hash,* 688 F.2d 49, 52 (8th Cir. 1982); *United States v. Bissonette,* 586 F.2d 73, 77 (8th Cir. 1978). Knowledge of the existence of the warrant is an equally essential element of conspiring to harbor or conceal in violation of 18 U.S.C. § 371, as charged in Count I of the indictment. *See United States v. Hogg,* 670 F.2d 1358, 1361 (4th Cir. 1982). Direct proof of knowledge of the existence of a warrant is rarely available. Rather, the knowledge element can be established by evidence from which the jury can properly infer knowledge and guilt beyond a reasonable doubt. *See Bissonette, supra,* 586 F.2d at 77. Additionally, in order to prove a violation of 18 U.S.C. § 371, the government had to prove: (1) the defendants entered into an agreement; (2) the agreement had as its objective a violation of the law, and (3) that one of those in agreement committed an act in furtherance of the objective. *Michaels,*

supra, 726 F.2d at 1310-11. Once the existence of the conspiracy is established, "even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme." *Id.* at 1311 (citations omitted).

Russell claims that the evidence was insufficient to support his conviction because it did not establish that he concealed Gordon Kahl. In this case the evidence overwhelmingly established that Russell knew a federal warrant had been issued for Kahl's arrest. The testimony showed that he had discussed the FBI wanted posters with Kahl and others. With the knowledge of the outstanding warrants, Russell allowed Kahl to stay in his home thereby concealing Kahl from the law enforcement agencies that sought his arrest. He instructed his daughter, who eventually turned Kahl in, to remain silent about the fugitive's presence and identity. On these facts we believe the jury could reasonably have inferred Russell's intention to prevent Kahl's discovery. Accordingly, his motion for acquittal was correctly denied.

Udey claims that the evidence failed to establish that he had knowledge of the existence of the warrant for Kahl's arrest. The appellant concedes that the evidence established that he met Gordon Kahl at Russell's home, referred to him by his alias name "Curly," and called him a hero. The evidence also established that Kahl visited Udey's home on at least two occasions. Nonetheless, Udey argues that the evidence failed to show that he knew Kahl's true identity, or that a warrant was outstanding for his arrest. The appellant alleges that the evidence was so scant that it allowed the jury merely to speculate, and that the jury must have had a reasonable

doubt as to his guilt. *See United States v. Frol,* 518 F.2d 1134, 1137 (8th Cir. 1975).

While the evidence with regard to Udey's guilt was not overwhelming, neither was it merely speculative. At a minimum it was sufficient to allow the issue to be presented to the jury which could properly have inferred "knowledge and guilt beyond a reasonable doubt." *Bissonette, supra,* 586 F.2d at 77. In addition to the circumstantial evidence discussed above, Karen Robertson testified that Mr. Udey was present during a May 30th discussion pertaining to the FBI closing in on Kahl; she specifically recalled seeing Udey's car.

> Q. Let's move on into May 30th, Memorial Day of this year, which you testified was the day Gordon Kahl left the residence. Do you recall that day?
>
> A. Yes, Sir.
>
> Q. Would you describe to the jury the facts and circumstances of his departure, his leaving your house?
>
> A. I had some stuff in the back of my pickup that I needed to unload and Mr. Ginter and Ed Udey were at the house and I went to get gas and unload the pickup. And when I was leaving, they all went into the motor home to talk.
>
> Q. Now, when you say, "they all went in the motor home to talk," name the people you're talking about, please.
>
> A. Mr. Kahl and Mr. Ginter and, I believe, Mr. Udey also.
>
> Q. Okay. Were there any vehicles there at your residence that did not belong either to you or your father?
>
> A. Yes, sir.
>
> Q. And would you describe as best you can any such vehicle.

A. Mr. Udey's car and another small subcompact car.

Q. Do you recall what color this other compact or subcompact car was?

A. It was kind of a yellow cream color.

Q. Now, you say that these people had a conversation there at your father's house on this occasion. Did you overhear any of that conversation?

A. Just that they thought the F.B.I. was closing in. That's—

Q. Now, you say you left to go on an errand; is that correct?

A. To get gas and then come back and unload my truck.

Q. Okay. When you got back, was Ed Udey's car still there and this other cream-colored compact?

A. When I backed my truck into the pasture, they were still there.

Transcript at 322-23. Although during cross-examination she did not place Udey at the scene of this discussion, her testimony raised a question of fact to be resolved by the jury. *See United States v. Vitale,* 728 F.2d 1090, 1094 (8th Cir. 1984). The jury may well have believed the testimony Robertson gave during direct examination that Udey was present at this discussion, and on that basis could reasonably have inferred guilt. Additionally, when viewing the evidence in the light most favorable to the government, including all reasonable inferences which may be drawn, we believe that "a reasonable jury could * * * have found beyond a reasonable doubt that the elements of the crime existed." *Jackson, supra,* 680 F.2d 563. In this case, the defendant's guilt is not being inferred solely on the basis of his presence or association with members of the conspiracy. *See United States v. Ward,* 703 F.2d 1058, 1062 (8th Cir. 1983). Rather,

the jury could reasonably have found him guilty based upon his involvement in the May 30th plan to move Kahl from the Russell residence to the Ginter residence in an attempt to avoid the FBI. This conclusion is buttressed by testimony elicited from Karen Robertson on direct examination which clearly established Udey's presence at the meeting in which the FBI's "closing in" was discussed. While Robertson's "I believe Mr. Udey" response may seem equivocal in terms of her placing him at the scene of this discussion, that response must be read in the context of the entire colloquy. Her responses to the preceding and subsequent questions, unequivocally place Udey at Russell's home before, during, and after the FBI "closing in" comment. On this basis we hold that the district court correctly denied Udey's motion for acquittal.

B. Double Jeopardy

Russell and Udey contend that their sentences under Counts I and II of the indictment constitute double punishment prohibited by the fifth amendment's double jeopardy clause. Count I of the indictment charged the appellants with conspiring to harbor and conceal Kahl; Count II charged the substantive violation of 18 U.S.C. § 1071.

It is axiomatic that the double jeopardy clause protects against multiple punishments for greater and lesser included offenses. *See United States v. Kirk,* 723 F.2d 1379, 1381 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 1717 (1948). It is equally well established that a defendant does not receive double punishment when he is convicted and sentenced for a substantive offense, and for conspiring to commit the offense. *See United States v. Austin,* 529 F.2d 559, 562 (6th Cir. 1976). The appellants assert that *Austin* carves out an exception to these rules

where proof of one count establishes the essential elements of the other. This is a fair interpretation of *Austin*.

In *Austin* the court held:

> [I]t is clear that the Fifth Amendment comes into play to prohibit double punishments where the substantive and conspiracy counts of an indictment charge essentially the same offense. * * * The test to be applied to determine whether the offenses are separate or essentially congruent is the "same evidence" test. As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act.

529 F.2d at 562 (citations omitted). Appellants contend that *Austin* was followed by the First Circuit in *United States v. DeVincent*, 632 F.2d 155, 159 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981), and the Second Circuit in *United States v. Sperling*, 560 F.2d 1050, 1055 (2d Cir. 1977). Appellants incorrectly construe these cases; *DeVincent* merely distinguished *Austin* in a footnote, and *Sperling* involved a conspiracy count and continuing criminal enterprise count, which, as this court has held, are greater and lesser included offenses. *See Kirk, Supra;* 723 F.2d at 1381.[3] The Sixth Circuit has itself limited *Austin* to those instances where the substantive offense charges the same agreement or concert of action as the conspiracy count. *See United States v. Fife*, 573 F.2d 369, 372-73 (6th Cir. 1976), *cert. denied*, 430

3. In *Kirk* this court specifically declined to decide whether multiple sentencing on conspiracy and criminal enterprise charges violates the double jeopardy clause. Similarly, our resolution of the issue presented by this appeal obviates the need to resolve that issue at this time.

U.S. 933 (1977); *see also United States v. Bankston*, 603 F.2d 528, 534 n. 7 (5th Cir. 1979) (limiting *Austin* in the same manner). This is not the factual circumstance presented in this case.

We believe that the distinction the First Circuit employed in *DeVincent*, is applicable here. That court stated:

> There is an exception where the substantive and conspiracy counts happen to charge essentially the same offenses. *United States v. Austin*, 529 F.2d 559, 562-64 (6th Cir. 1976). That is not true here even if the exception be extended to a lesser included offense. *As we have said, count one required proof of a conspiracy, while that was no element of count three; conversely, count three called for actual commission of, or attempt to commit, the crime of extortion, while count one did not extend beyond a conspiracy.*
>
> As this court pointed out in *Cruz, supra*, 568 F.2d at 783, *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), treated the two offenses involved as lesser and greater because each was thought to require as necessary elements concerted action on the part of the participants. That is not true here.

632 F.2d at 159 n.8 (emphasis added). Here it was not necessary to prove completion of the substantive offense in order to prove conspiracy, nor was proof of a conspiracy necessary to a conviction for the substantive crime charged. Accordingly, we hold that the appellants did not receive unconstitutional double punishment when they were sentenced on the substantive harboring offense under 18 U.S.C. § 1071, and for conspiring to commit that offense.

C. Suppression of Evidence

a) Invalid Warrant

The Ginters moved to suppress the evidence discovered in their home as having been discovered pursuant to an invalid warrant. The crux of the appellants' argument is that the affidavit in support of the warrant was insufficient to establish probable cause to believe that Gordon Kahl was at the Ginters' residence. They claim the affidavit was based upon hearsay, and that statements contained in the affidavit were incorrect. The affidavits in question stated essentially the following:

> I am James T. Blasingame. I am a special agent with the FBI. I am the resident agent in charge of the FBI in Arkansas. A special agent of the FBI who is under my direct supervision and who I know to be reliable and who I will call Agent X in this affidavit informed me that he had been told by a confidential informant who I will call informant Y in this affidavit that informant Y had personally seen Gordon Wendell Kahl on May 30, 1983 traveling with Leonard Ginter and Norma Ginter in a cream colored 1980 Dodge Omni. Agent X further told me that he personally knew Informant Y was reliable because Informant Y was an upstanding citizen who had never been in any trouble.
>
> The identity of Agent X and Informant Y must be kept secret because the disclosure of Agent X's identity would in turn automatically disclose the identity of Informant Y and such a disclosure would endanger Informant Y. For the same reasons the location where Informant Y saw Gordon Wendell Kahl must be kept secret. Following the sighting of Gordon Wendell Kahl on May 30, 1983 with Leonard Ginter and Norma Ginter an airplane surveillance was undertaken and I personally observed

the 1980 cream colored Dodge Omni from a plane in the vicinity of Leonard Ginter's residence located on the Bill Wade property as described above on June 2, 1983 at approximately 4:00 P.M. o'clock.

I am Dero Downing and I am a special agent with the FBI and I personally observed on June 3, 1983 at 10:48 A.M. the cream colored Dodge Omni with Leonard Ginter driving to his residence as described above. I verified by my personal investigation that Leonard Ginter was in Smithville, Ark. on the morning of May 31, 1983.

I, James T. Blasingame do believe that Gordon Wendell Kahl is at the Leonard Ginter residence located on the Bill Wade property as described above because he was traveling with Leonard Ginter as described above on May 30, 1983 and Leonard Ginter was in Smithville on May 31, 1983 and Leonard Ginter and the car Ginter and Kahl were traveling in is presently at the Leonard Ginter residence as described above and in addition I personally know that the Ginter residence located on the Bill Wade property is an isolated area suitable for a hide out for a fugitive such as Kahl.

At trial it was revealed that Agent X was Special Agent Knox of the FBI, and Informant Y was Karen Robertson. The evidence also established that Karen Robertson had not told law enforcement officers that she had seen Kahl in the Ginters' cream colored 1980 Dodge Omni, rather she had described the vehicle as a cream colored subcompact car similar to the one driven by Udey but lighter.

In *United States v. Doty,* 714 F.2d 761 (8th Cir. 1983), this court established the analysis to be employed when evaluating hearsay challenges to affidavits supporting warrants. This court opined:

The standards for evaluating the validity of a search warrant based on hearsay were recently modified by the Supreme Court. In *Illinois v. Gates*, ____ U.S.____, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), a majority of the Court abandoned the "two-pronged" [*Aguilar-Spinelli* test], and substituted in its place a "totality of the circumstances" approach. *Gates*, 103 S.Ct. at 2332. Under this standard,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. (*quoting Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)).

In this context, we also observe that courts "evince a strong preference for searches made pursuant to warrant, and, in some instances, may sustain them where warrantless searches based on a police officer's evaluation of probable cause might fail." *United States v. Carlson*, 697 F.2d 231, 237 (8th Cir. 1983). "[R]eviewing courts should interpret affidavits in a common-sense and realistic fashion, and deference is to be accorded an issuing magistrate's determination of probable cause." Id. Moreover, we are cognizant of the value to be given the corroboration in details of an informant's tip by independent police efforts. *Gates*, 103 S.Ct. at 2334; *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959).

Id. at 763. Under the "totality of the circumstances" approach established in *Gates*, and adopted by this court in *Doty*, the affidavits provide a sufficient foundation upon which the magistrate could have found probable cause to issue the warrant.

Here there was a tip given by an informant to an experienced FBI agent, to the effect that Kahl was with a given group of people in a particular type of car. The tip was subsequently corroborated by an aerial surveillance of the defendants' home where the car was in fact seen. We are satisfied that the affidavit provided a sufficient basis for the issuing magistrate's "commonsense" finding of probable cause. *Doty, supra,* 714 F.2d at 763.

Our conclusion is not altered by the alleged misstatement in the affidavit that Karen Robertson described a "cream colored 1980 Dodge Omni." Special Agent Knox testified that although the affidavit attributed this specific description of the vehicle to the informant, he had in fact arrived at this description based on the information she had given him. Even if the affidavit had merely described the vehicle as a "cream colored subcompact" similar to a Dodge Omni, the subsequent corroborating aerial surveillance would have been sufficient to establish probable cause. The fact that there also may have existed probable cause to believe that Kahl was in the Udey vehicle—a cream colored subcompact—does not vitiate or militate against the probable cause determination regarding the Ginters.

Assuming arguendo that the warrant was invalid, the evidence discovered during the initial entry into the Ginters' home was nonetheless lawfully seized, and, there-

fore, admissible. The testimony shows that when Special Agent Blasingame was asked for a search warrant by Leonard Ginter, the shooting began inside the Ginter residence. From that moment forward, the house became the scene of a crime committed in the officers' presence. *See United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982), *aff'd in relevant part*, 710 F.2d 431, 432 (8th Cir. 1983) (en banc). Any weapons which were in plain view at the scene of the crime were thereby legitimately seized. Common-sense dictates that the potential danger at the scene of the crime and the attendant exigencies, including the need to aid anyone in the home validated the initial intrusion into the Ginters' home.

Gordon Kahl's body was discovered during the initial entry into the home by law enforcement authorities. His mini-14 rifle was also discovered pursuant to the initial search. These items were clearly admissible.

The Remington pump shotgun belonging to the United States Marshals' office in North Dakota was discovered the day after the shootout pursuant to a search under the warrant. Even if the warrant was improvidently issued, the admission of the shotgun was harmless error beyond a reasonable doubt. *See* FED. R. CRIM. P. 52(a). The plain view discovery of the corpse, subsequently identified as Gordon Kahl, and the mini-14 rifle, clearly provided sufficient evidence upon which to convict the defendants. The shotgun cannot be said to be crucial evidence. Accordingly we hold that the motion to suppress was properly denied.

b) Ginters' Incriminating Statements

The Ginters argue that their initial responses to law enforcement officers' questions regarding the presence

of others in their home should have been suppressed as they were not informed of their *Miranda* rights. Without examining the merits of this claim, the appellants concede that their motion to suppress did not address these statements. Furthermore, no objection was made to Agent Blasingame's testimony regarding those statements. Accordingly, the issue was not properly preserved for appeal because no objection was made at trial to the admission of the testimony. FED. R. EVID. 103; *see United States v. Vitale*, 728 F.2d 1090, 1092 (8th Cir. 1984); *United States v. Wagoner*, 713 F.2d 1371, 1376 (8th Cir. 1983). "Furthermore, we cannot say that appellant's claim amounts to plain error under FED. R. CRIM. P. 52(b)." *Vitale, supra*, 728 F.2d at 1092.[4]

Norma Ginter additionally challenges the admissibility of inculpatory statements she made to law enforcement officers following her arrest. On the night of June 3, 1983, when Mrs. Ginter was being transported from her home to the police station upon being advised of her *Miranda* rights she invoked her right to silence. Later that night, or early the following morning, after being advised of her *Miranda* rights again and executing a document to that effect, she offered a statement to the authorities. At the suppression hearing she testified that this statement was not coerced. On June 7, 1983, Special Agent Calhoun again sought to speak with Mrs. Ginter but she indicated that she did not want to be

4. We note that the Supreme Court recently upheld the "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence. *New York v. Quarles*, 104 S.Ct. 2626 (1984). We believe that the rationale employed in *Quarles* is applicable to the circumstances presented here and provides an alternative ground upon which to uphold the denial of the Ginters' motion to suppress.

interviewed. On June 9, 1983, Special Agent Downing interviewed Norma Ginter after again advising her of her rights in writing.

The appellant claims that her statements should have been suppressed as the agents had no rights to resume questioning once she had invoked her right to silence. The district court rejected the appellant's claim. The court held that while invoking the right to counsel *per se* invokes the right to have all interrogation cease until an attorney is present,[5] *see Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981), the reverse was not true. *See Michigan v. Mosely*, 423 U.S. 96, 104 n. 10 (1975). In this case the court determined that the appellant had never requested counsel, and that her initial request to remain silent was tentative and equivocal. On this basis the subsequent police-initiated conversations were held not to contravene the accused's constitutional rights. This determination was not factually erroneous, nor does it evolve from an errorneous application of the law. *See United States v. McGlynn,* 671 F.2d 1140, 1143 (8th Cir. 1982).

The court recognized that having satisfied the *Edwards* test, an inquiry still remained as to whether or not the waiver of the right to silence was valid. The court stated:

> This does not end the inquiry, however. The Court must determine whether Norma Ginter validly

5. While there is support for a *per se* exclusionary rule where the right to counsel has been invoked, that position does not have uniform acceptance at this time, and no definitive statement has been made by the Supreme Court on this issue. *See Oregon v. Bradshaw*, 103 S.Ct. 2830, 2836 & n.1 (1983) (Powell, J., concurring); *Michigan v. Mosely*, 423 U.S. 96, 104 n.10 (1975).

> waived her right to silence, *i.e.*, whether the purported waiver was knowing and intelligent under the totality of the circumstances.
>
> None of the authorities made any threats, promises or offered any inducements to talk. Norma Ginter was repeatedly advised of her rights and she stated she understood them. She did not request an attorney prior to any of the interrogations. She never stated that she intended to make no statement ever, but rather equivocally advised the authorities that she did not want to talk to them at the particular time.
>
> Considering the totality of the circumstances, the Court believes that the government has demonstrated that Norma Ginter knowingly and intelligently waived her right to remain silent and thus her statements are admissible.

United States v. Ginter, Crim. No. 83-30009-01, slip op. at 26-27 (W.D. Ark. Sept. 29, 1983). We believe the district court correctly decided this issue. *See McGlynn, supra*, 671 F.2d at 1143.

As this court recently stated, the test to be employed when examining the propriety of a resumption of questioning after the right to remain silent has been invoked, is whether the defendant's right to cut off questioning has been "scrupulously honored." *Jackson v. Wyrick*, 730 F.2d 1177, 1179 (8th Cir. 1984). Several factors are employed in making this determination where the police renew interrogation.

> These factors are: a) whether the police immediately ceased the interrogation upon defendant's request, b) whether they resumed questioning only after the passage of a significant period of time and provided

> fresh *Miranda* warnings and c) whether they restricted later interrogation to a crime that had not been the subject of the first interrogation. *Michigan v. Mosely, supra,* 423 U.S. at 106.

Id.

In this case the officers did not pursue questioning when the defendant indicated she did not wish to talk. This was true despite the equivocal nature of the defendant's request to remain silent. After Mrs. Ginter was taken to the police station and allowed to rest the officers sought to question the defendant. Nearly six hours had elapsed between the first and second attempt to question the defendant. Fresh *Miranda* warnings were given, and a rights acknowledgement form signed. At the time the third interrogation was attempted the police had no reason to believe the defendant was unwilling to talk. When she expressed some unwillingness to talk, the interrogation was terminated. Forty-eight hours elapsed before the officers resumed questioning again. Although each of the interrogation concerned Gordon Kahl and the June 3, 1983 shootout, this factor alone is not sufficient to find a violation of Ginter's constitutional rights. *See Jackson, supra,* 730 F.2d at 1179-80; *United States v. Finch,* 557 F.2d 1234, 1236 (8th Cir.), *cert. denied,* 434 U.S. 927 (1977). Accordingly, we hold that the motion to suppress was properly denied.

Finally, Mr. Ginter claims that the district court erred in not suppressing a statement he made to law enforcement authorities at the time of his arrest. It is clear that the statement was voluntarily made by the defendant after he had been informed of his *Miranda* rights. The district court's finding that "Leonard Ginter was anxious to speak

his piece," was not clearly erroneous. *See McGlynn, supra,* 671 F.2d at 1143. Accordingly, his motion to suppress was properly denied.

D. Expert Testimony

At trial the defendants attempted to present testimony of an arson investigator and a chemical analyst, whom they had hired to investigate the source and cause of the fire at the Ginter residence. They assert that such testimony would have shown that government agents intentionally destroyed fingerprint evidence of the burned body taken from the residence. The district court excluded the testimony, and the defendants assert that the court erred in this regard.

The admission or exclusion of expert testimony is a matter within the sound discretion of the district court. *See United States v. Purham,* 725 F.2d 450, 454 (8th Cir. 1984). The district court did not abuse its discretion in excluding the proffered testimony, as it does not appear to have been germane to any issue at trial.

A review of the trial transcript reveals that the defendants did not claim that the government intentionally destroyed Gordon Kahl's fingerprints. Rather, their claim was that certain government documents were relevant to show that the authorities caused the fire. The district court held that only exculpatory evidence was relevant, and that the documents sought were not exculpatory.[6] *See United States v. Peltier,* 731 F.2d 550 (8th Cir. 1984). Subsequently, after the district court refused to accept certain

6. The district court also noted that the destruction of the fingerprints by the fire potentially served to aid the defendants because it made it more difficult for the government to establish the identification of the corpse.

expert testimony proffered by the defendants pertaining to the government's conduct regarding fire, an offer of proof was made.[7] That offer of proof is void of any indication that the law enforcement authorities intentionally destroyed fingerprint evidence; the offer went only to the cause of the fire. This testimony was not relevant to any issue at trial. Accordingly, the district court did not abuse his discretion in this regard.

E. Counsel of Choice

The Ginters are indigent and were therefore appointed counsel. On October 11, 1983, they filed a motion for counsel of their choice in order to obtain someone who shared their beliefs about this country's tax laws. The district court did not grant their request. Appellants claim that the court erred in this regard.

In *United States v. Weninger,* 624 F.2d 163 (10th Cir.), *cert. denied,* 449 U.S. 1012 (1980), the court addressed a similar argument and held:

> The record indicates that Weninger had no intention of hiring a lawyer unless the lawyer agreed with his views about the invalidity of the tax laws. However, the right to assistance of counsel does not imply the absolute right to counsel of one's choice.

624 F.2d at 166. *See also Grady v. United States,* 715 F.2d 402, 404 (8th Cir. 1983). On this basis, we believe that the appellants' claim is without merit.

---

7. In addition to appellant Russell's offer in this regard, the Ginters made an offer of proof regarding a local marshal's testimony as to the cause of the blaze. Although they delineate this issue in the statement of issues contained in their brief, they do not provide the court with any argument in support of this contention. Therefore, the issue was not properly presented to this court. *See* FED. R. APP. P. 28(a)(4).

F. Exclusion of Ginters' Statements to Police

At trial Mr. and Mrs. Ginter sought to call law enforcement officers to the stand to testify as to certain exculpatory comments the defendant had made to the officers after their arrest. The statements were disallowed as hearsay. They now claim the district court erred in not allowing the testimony, as it fell within the exceptions to the hearsay rule. We reject the defendants' arguments

Leonard Ginter relies on FED. R. EVID. 803(3), which provides as a hearsay exception "[a] statement of the declarant's then existing state of mind, emotion * * *." Any evidence of Leonard Ginter's existing state of mind or emotion on June 5, 1983, the date the allegedly exculpatory statement was made, clearly was not relevant to the charges in the indictment which concerned the events of June 3, 1983. *See* FED. R. EVID. 401. This is buttressed by the Advisory Committee Notes to Rule 803(3), which state that this exception is a specialized application of the present sense impression exception contained in Rule 803(1).

Both defendants claim their statements were admissible under FED R. EVID. 804(b)(3), as declarations against interest. They assert that they were unavailable as witnesses, as required by the rule, because of their fifth amendment privilege not to testify. *See Walker v. Lockhart*, No. 81-1700 slip op. at 4 (8th Cir. June 13, 1984). (Arnold J., concurring). However, 804(a)(1) defines "unavailability as a witness" as the situation in which the declarant is exempted by ruling of the court on the ground of privilege. As the Advisory Committee Notes state: "[a] ruling by the judge is required, which clearly implies that an actual claim of privilege must be made." The record

in this case reflects neither a claim of privilege, nor a ruling by the court.

Finally, we note that the offers of proof with respect to the officers' testimony failed to establish that the statements were inculpatory. The evidence would have shown that the Ginters planned to negotiate the surrender of Kahl in another week. Given the overwhelming evidence in this case, we do not believe the exclusion of this evidence affected the outcome of the trial. To the contrary, any error committed was harmless beyond a reasonable doubt. *See* FED. R. CRIM. P. 52(a).

G. Sentence

Udey challenges the harshness of his sentence. Udey's five year sentence was within the statutory limit for the offense committed. A sentence within the statutory limits is generally not disturbed. *United States v. Caspers,* No. 83-2597, slip op. at 7 (8th Cir. June 20, 1984). Absent an abuse of discretion "[t]his court will not substitute its judgment for the discretion committed solely to the district court." *United States v. Roth,* No. 83-1983, slip op. at 13 (8th Cir. June 12, 1984). The district court did not abuse its discretion in this case.

CONCLUSION

We have examined the appellants' remaining arguments and find them to be without merit.[8] Accordingly, the convictions are affirmed.

---

8. There are several other issues raised in the appellants' briefs, but they fail to set forth any arguments in support of many of these contentions, as required by FED. R. APP. P. 28(a)(4). As to these arguments, the court expresses no judgment, but instead notes that "[w]e are not required to search the record for error," as that burden is on the party alleging such. *Holt v. Sarver,* 442 F.2d 304, 307 (8th Cir. 1971).

Lay, Chief Judge, concurring and dissenting.

I concur in the majority's holding that there was sufficient evidence to sustain the convictions of defendants Russell and Ginter. I also agree that the alleged procedural and constitutional errors were harmless and did not prejudice Russell and Ginter's trial.

I cannot, however, agree that sufficient evidence exists to convict Edwin Udey of harboring or concealing fugitive Gordon Kahl in violation of 18 U.S.C. § 1071 (1982) or of conspiring to harbor or conceal Kahl in violation of 18 U.S.C. § 371 (1982).

The record does not provide adequate support for the majority's factual inferences and conclusions surrounding Udey's involvement in either the conspiracy or the actual harboring and concealing of Kahl. The majority states that Robertson's testimony "unequivocally place[s] Udey at Russell's home before, during, and after the FBI 'closing in' comment." Robertson testified only that she *believed* Udey *entered the motor home* with Ginter and Kahl. No testimony revealed what was discussed. As shown in the portion of the record quoted in the majority opinion, the remark describing the FBI as "closing in" did not occur in the motor home, but in Russell's house. Robertson was present at this conversation. She did not identify Mr. Udey as present at or taking part in the discussion.[1] In fact, on cross-examination, Robertson testified that only Wade, Ginter, and Kahl participated in the May 30th conversation:

> Q. I would like to bring you back to that portion of your sworn under oath testimony about the con-

1. In all due respect, the majority misstates the record when it says that "Karen Robertson testified that Mr. Udey was present during a May 30th discussion * * *."

versation at your father's house with the gentleman you have identified to this jury as Gordon Kahl in which there was talk that the FBI was closing in. Was it the talk that the FBI was closing in on Mr. Gordon Kahl?

* * *

Q. Okay. Please tell me who was having this conversation.

A. I believe that it was Mr. Wade, Mr. Ginter and Mr. Kahl.

Q. You're not certain?

A. I do not believe my father [Russell] was entered into this conversation.

* * *

Q. During this discussion that you had about—well, that you've testified under oath that Bill Wade, Mr. Ginter and your Gordon were having conversation about the FBI closing in, was this conversation true? Was the FBI closing in or do you have any knowledge of that?

A. I didn't have knowledge of it at this time, no. I did not know whether the FBI was closing in or not.

Q. Didn't you participate in that conversation?

A. I was standing there, yes.

* * *

Q. Was Edwin Udey present at that time?

A. No, sir.

* * *

Q. What did you hear Edwin Udey plan about any of this?

A. The only thing I know of Mr. Udey doing in this was inviting Mr. Kahl over for supper and coming over and getting him and taking him over for supper.

* * *

Q. This conspiracy, what part did you hear Edwin Udey play?

A. I have just stated.

Q. Other than this dinner that you've described, that's it; is that correct?

A. And Mr. Udey knew who he was and knew he was there.

Transcript at 395-414. Robertson thus clarifies that Udey was not present at the alleged conversation concerning the FBI. The majority considers relevant Robertson's recollection that Udey's car was present at the Russell residence. The presence of Udey's car, however, does not show that Udey was part of the conversation regarding the progress of the FBI.

The government has the burden of proving Udey's guilt beyond a reasonable doubt. *All that has been proven is that Udey was associated with and in the presence of persons who did commit felonies. Cf. United States v. Kelton,* 446 F.2d 669 (8th Cir. 1971) (holding that no predicate of proof existed to support the conviction of a defendant for wilfully aiding and abetting the commission of a bank robbery where there was no evidence to show that the defendant had engaged in some affirmative conduct in furtherance of the crime). As this court has stated: "Knowledge of the existence or acquiescence in a conspiracy does not serve to render one a part of the conspiracy. There must exist some element of affirmative cooperation or at least an agreement to cooperate." *United States v. Collins,* 552 F.2d 243, 245 (8th Cir.), *cert. denied,* 434 U.S. 870 (1977) *quoted in United States v. Brown,* 584 F.2d 252, 262 (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979).

Further, the prosecution must prove beyond a reasonable doubt that Udey knew a federal warrant had been issued for Kahl's arrest. 18 U.S.C. § 1071 (1982); *see United States v. Hogg,* 670 F.2d 1358 (4th Cir. 1982);

18 U.S.C. § 371 (1982). No evidence, circumstantial or otherwise, has proven beyond a reasonable doubt that Udey knew of the federal warrant issued for Gordon Kahl's arrest. Udey's reference to Kahl as "Curley" or "a hero" fails to show that Udey knew a federal warrant was outstanding for Kahl's arrest. An essential element of both the conspiracy and substantive offense of which Udey was convicted thus is not supported with sufficient evidence.

In light of Robertson's sworn testimony, the record fails to demonstrate sufficient evidence to prove beyond a reasonable doubt that Udey either conspired with Kahl, Ginter, and Russell to conceal and harbor a fugitive or actually did harbor Kahl. I cannot agree that the scant evidence showing Udey's association with his co-defendants and Kahl meets the onerous burden of proof the government must satisfy before it can send any individual, presumed to be innocent, to prison. Udey's conviction should be reversed. *Cf. United States v. Ward*, 703 F.2d 1058 (8th Cir. 1983) (holding that evidence of defendant's fingerprints on marijuana plantholders and evidence establishing defendant's connection with co-conspirators was insufficient to show knowing participation in marijuana growing scheme); *United States v. Brown*, 584 F.2d 252 (8th Cir. 1978) (reversing despite considerable circumstantial evidence defendant's conviction of participation in conspiracy to distribute heroin because the evidence did not sufficiently establish defendant's participation).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984.

No. 83-2632-WA.

United States of America,
Appellee,

v.

Arthur H. Russell,
Appellant.

Filed: December 28, 1984

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

* * *

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
Harrison Division

DOCKET NO. 83-30009-03

UNITED STATES OF AMERICA

v.

ARTHUR H. RUSSELL

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, November 29, 1983, with counsel, Mr. Joe Alfred Izen, Jr., pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of Conspiracy to harbor and conceal person from arrest and aiding and abetting, as charged in Count I of the Indictment in violation of 18 U.S.C. 371 and 2.

Harboring and concealing person from arrest, as charged in Count II of the Indictment in violation of 18 U.S.C. 1071.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney Gen-

eral or his authorized representative for imprisonment for a period of five (5) years on each of counts one and two of the indictment and on condition that the defendant be confined in a jail type or treatment institution for a period of six months. The execution of the remainder of imprisonment is hereby suspended and the defendant placed on probation for a period of four years to commence upon the defendant's release from confinement upon the regular terms and conditions of probation.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal or other qualified officer.

/s/ H. FRANKLIN WATERS
H. Franklin Waters
U. S. District Judge

Date: November 29, 1983.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

v.

ARTHUR H. RUSSELL.

NO. 83-2632

MOTION FOR STAY (OR RECALL)
OF ISSUANCE OF MANDATE

To The Honorable Circuit Justices
Or Clerk Of Said Court:

COMES NOW, Arthur H. Russell, Appellant, by and through his attorney of record, Joe Alfred Izen, Jr., and requests that this Honorable Court stay or recall the Mandate in the above referenced cause of action and in support of said Motion, would show this Honorable Court the following:

1. This Motion is brought pursuant to the authority of Rule 41(b) of the Federal Rules of Appellate Procedure and Local Rule 18 of the United States Court of Appeals for the Eighth Circuit.

2. Heretofore, Co-Appellant and Co-Defendant, Edwin C. Udey, petitioned this Court for re-hearing en banc. Later, the full Court, over four dissents, refused to grant re-hearing.

3. The case of Arthur H. Russell has been consolidated, for practical purposes with Edwin C. Udey's,

during the course of this appeal. The cases were joined for oral argument by the Court and this Court of Appeals rendered a Joint Opinion (through one of its Panels) affirming all of the convictions of the various Defendants.

4. On or about January 8, 1985, Co-Appellant and Co-Defendant, Edwin C. Udey, moved through his counsel, Michael Louis Minns, for a Stay of the Issuance of the Mandate in this cause pending Application to the United States Supreme Court for a Writ of Certiorari.

5. Within seven days from the date of receipt of this Motion of his Co-Defendant and Co-Appellant, Arthur H. Russell hereby moves this Court for the entry of an Order staying or recalling the issuance of mandate in his case, and granting him a period of time of forty-five days from the date of said Order to apply to the United States Supreme Court by way of Petition for Writ of Certiorari, for a review of his conviction and sentence.

6. Arthur H. Russell's counsel specifically advises the Court that he has conferred with his client, who is of advanced years (72 years of age) and Russell, though of modest financial means, has indicated his desire to pursue an appeal to the United States Supreme Court.

7. Other than an enlargement of time which this Court granted for the filing of the Briefs in this cause, Arthur H. Russell, has not sought nor received, any extensions of time which resulted in any considerable periods of delay in the pursuit of the above appeal.

8. An additional fifteen days is requested over and above the thirty day period normally provided for under Rule 41(b) of the Federal Rules of Appellate Procedure

due to the extensive and complicated nature of the grounds of appeal which Appellant desires to present to the Supreme Court through the contemplated Petition.

9. The Appellant, Arthur H. Russell, is already on bond, having been released by the United States District Court for the Western District of Arkansas, Honorable Franklin Waters, on his own personal recognizance. Thus, this Court, should said Mandate be stayed (or recalled) need take no action with respect to bond or bail concerning the Defendant at the present time.

10. In compliance with Local Rule 18 of this Court of Appeals, Arthur H. Russell affirmatively states that he intends to present the following issues to the Supreme Court of the United States for review:

(a). Whether intentional Government destruction of evidence mandates a new trial or reversal of his conviction?

(b). Whether Russell's conviction for conspiracy and aiding and abetting the harboring of the alleged fugitive, Gordon W. Kahl, violated his right to be free from double jeopardy under the Fifth Amendment to the United States Constitution?

(c). Whether certain cumulative confessions of Co-Defendants Leonard Ginter and Norma Ginter were erroneously admitted into evidence by the District Court resulting in substantial prejudice to Appellant and mandating a new trial?

11. In counsel's studied opinion all of the above issues are "substantial" and non-frivolous. Appellant will vigorously prosecute his Application to the Supreme Court for a Writ of Certiorari and will take the necessary steps

to lodge same with the Clerk of the Supreme Court of the United States within the forty-five day period, if granted. Appellant also affirmatively states that he will diligently pursue the Application to its conclusion.

12. For the purposes of this Motion, Appellant, Arthur H. Russell, adopts by reference and joins in, all arguments made by his Co-Defendant and Co-Appellant, Edwin C. Udey, in his "Motion for Stay of the Issuance of the Mandate" where not inconsistent with the allegations contained herein.

13. The Motion for the Stay of the Issuance of the Mandate, file by Co-Appellant Edwin C. Udey, is presently before the Court and has not yet been disposed of. Appellant Arthur H. Russell essentially joins in the request for relief contained in said Motion as indicated above.

WHEREFORE, ABOVE PREMISES CONSIDERED, Appellant, Arthur H. Russell, prays that this Honorable Court entertain this Motion and, after due consideration of same, that this Court enter an Order: (1) staying (or recalling) the Mandate in this cause; (2) granting Appellant forty-five days within which to apply to the Supreme Court of the United States for review of his conviction and sentence by way of Petition for Writ of Certiorari; (3) thereafter staying the mandate, in conformity with Rule 41(b) until final disposition on the Application by the Supreme Court of the United States; and (4) granting Appellant such other and further re-

lief, both in law and in equity, to which Appellant may show himself to be justly entitled.

Respectfully submitted,

/s/ JOE ALFRED IZEN, JR.
Joe Alfred Izen, Jr.
Attorney for A. H. Russell
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Houston, Texas 77074
(713) 776-0850

CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that a true and correct copy of the foregoing was sent to Asa Hutchinson, Assistant U.S. Attorney, P. O. Box 1524, Fort Smith, Arkansas 72902 on this the 15th day of January, 1985 by United States mail, postage prepaid.

/s/ JOE ALFRED IZEN, JR.
Joe Alfred Izen, Jr.